UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT L. STEWART,

Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

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No. C-99-4058 JCS

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendants' Motion For Summary Judgment ("Motion") came on for hearing on Friday, October 6, 2000, at 1:30 p.m. For the reasons stated below, Defendants' Motion is GRANTED IN PART and DENIED IN PART.

II. BACKGROUND

Plaintiff is a white male Vietnam War veteran who was employed by the Golden Gate National Cemetery, a division of the United States Department of Veterans Affairs, until July 1993, when he was terminated after voluntarily admitting himself into the San Francisco veteran's hospital for treatment of symptoms related to his Post Traumatic Stress Disorder ("PTSD"). Plaintiff alleges that he was discriminated against on the basis of both disability and race and also asserts claims for negligent and intentional infliction of emotional distress.

A. Facts[1]

Plaintiff was hired by the Golden Gate National Cemetery (the "Cemetery") in August 1991. Stewart Deposition at 27 (Exh. A to Declaration of Neal Rubin in Support of Motion For Summary Judgment ("Rubin Decl.")). Plaintiff's responsibilities included trimming and maintaining headstones and markers, edging curbs, fences and sidewalks, and operating and maintaining tools and equipment. *Id*. at 39. Plaintiff's immediate supervisor was Chris DeLasorda. Opposition at 2. Chris DeLasorda, in turn, reported to William Livingston and Cynthia Nunez. *See* DeLasorda EEOC Statement (Exh. K2 to Levin Decl.)[2] According to William Livingston, Plaintiff was "an excellent worker" the "first couple of years" and was recommended for and received a performance award. Livingston EEOC Statement (Exh. B to Declaration of Alan S. Levin And Exhibits To Plaintiff's Opposition To Defendant's Motion For Summary Judgment ("Levin Decl."). Although Plaintiff was hired under a six month contract, his contract was automatically renewed at the end of each six month period until he was terminated. *Id*. at 43. At the time of his termination, his term of employment was set to expire on September 30, 1993. Declaration of Cynthia Nunez in Support of Motion For Summary Judgment ("Nunez Decl.") at 3, ¶ 9. Because Plaintiff was classified as a temporary employee, he was paid on an hourly basis and was not eligible for health care benefits. Nunez Decl. at 2, ¶ 3.

In September 1991, Plaintiff began to undergo treatment for stress at the Veteran's Center, in San Francisco. Stewart Deposition at 78 (Exh. A to Rubin Decl.). Soon thereafter, he was classified as 30% disabled by the Veterans Administration, on the basis of his combat-related post-traumatic stress disorder

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[1] In summarizing the facts, the Court has relied upon undisputed facts whenever possible. Where the facts are in dispute, the Court has drawn all inferences in favor of Plaintiff. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1373 (9th Cir. 1987) (holding that on summary judgment court must view the evidence and the inferences from that evidence in the light most favorable to the nonmoving party).

[2] The Court notes that Plaintiff has failed to appropriately authenticate, or even identify, many of the documents contained in the exhibits filed in support of his opposition to Defendants' Motion For Summary Judgment, as is required under Civil Local Rule 7-5 (a) and Fed. R. Civ. P. 56(e). With the exception of Exhibits BB and II, to which Defendants have raised evidentiary objections, the Court has considered these documents in determining whether summary judgment is appropriate. The Plaintiff is cautioned, however, that these documents will not be admitted into evidence at trial unless Plaintiff has clearly identified and authenticated each document in a supporting declaration. With respect to Defendants' objections to Exhibits BB and II, the Court has not relied upon these documents and therefore does not rule on these objections at this time.

("PTSD").[3] July 21, 1992 Letter From Veterans Affairs to Stewart (Exh. A to Levin Decl.). William Livingston was aware that Plaintiff was classified as 30% disabled, and at some point he told Cynthia Nunez that Plaintiff was disabled. Livingston EEOC Statement (Exhs. B and C to Levin Decl.). Plaintiff's immediate supervisor, Chris DeLasorda, was also aware of Plaintiff's disability. DeLasorda EEOC Statement (Exh. K1 to Levin Decl.). In July of 1992, Plaintiff began to receive treatment from Dr. Erwin Lewis at Fort Miley. *Id*. For two or three months, Plaintiff went to daytime therapy sessions approximately three times a week, with the prior approval of his supervisors. Stewart Deposition at 79-81 (Exh. A to Rubin Decl.); *see also* Stewart Deposition at 86 (Exh. W to Levin Decl.). Subsequently, he was able to attend evening therapy sessions when a night group for Vietnam veterans was formed. *Id*. Sometime in the spring of 1993, Plaintiff requested, at the advice of his physician, that he be allowed to work alone and his supervisors allowed him to do so. Nunez Decl. at 2, ¶ 5.

In June of 1993, Plaintiff's physician, Dr. Erwin Lewis, sent a letter to Cynthia Nunez (one of Plaintiff's supervisors) stating that he had recommended that Plaintiff enter the hospital because he was experiencing "increasing stress, depression, anger, and Post-Traumatic Stress Disorder (PTSD) symptoms." June 29, 1993 Memorandum (Exh. D2 to Levin Decl.)[4]; Nunez Decl. at 3, ¶ 6. Plaintiff had, in fact, been admitted to the hospital on June 25, 1999. Stewart Deposition at 173 (Exh. A to Rubin Decl.). Dr. Lewis further stated in his letter that he expected that Plaintiff probably would be hospitalized "several more weeks." June 29, 1993 Memorandum (Exh. D2 to Levin Decl.). Although Cynthia Nunez states in her declaration that she believes that she first learned of Plaintiff's hospitalization when she received the letter from Dr. Lewis (that is, almost a week after Plaintiff entered the hospital), *see* Nunez Decl. at 3, ¶ 6, Plaintiff has presented evidence that he had sought and received leave from at least one of

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[3] According to Plaintiff's Opposition, Plaintiff was reclassified as of October 1994 as 100% disabled, retroactive to July 1993. Opposition at 9.

[4] Plaintiff has attached as an exhibit a version of the Lewis letter that is slightly different from the version presented by Defendants. *See* Exh. D2 to Levin Decl.; *cf*. Exh. A to Nunez Decl. Both letters are dated June 29, 1993 and the content is substantially the same except that the version presented by Defendants includes the following sentence, which is not contained in the Plaintiff's version: "I believe the causes to be related to work related problems." Plaintiff argues strenuously that the version provided by Defendants is a forgery. *See* Opposition at 11-12. For the purposes of this motion, the Court relies upon Plaintiff's version of Dr. Lewis letter. The Court notes, however, that its ultimate conclusion concerning the validity of Defendants' arguments in this motion would be unaffected, regardless of which version it considered.

his supervisors prior to entering the hospital. *See* DeLasorda EEOC Statement (Exh. M to Levin Decl.) (stating that he was sure that Plaintiff had requested leave before entering the hospital); Stewart Deposition at 170 (Exh. DD to Levin Decl.) (stating that Chris DeLasorda spoke to Dr. Lewis about Stewart approximately one week before Stewart entered the hospital); Deposition of Cynthia Nunez at 65 (Exh. Z to Levin Decl.) (conceding that Plaintiff was "hospitalized with appropriate leave").

On July 9, 1993, Plaintiff called Cynthia Nunez from the hospital to discuss his work situation, and Ms. Nunez asked him when he would be able to return to work. Nunez Decl. at 3, ¶ 8. The facts are in dispute regarding the content of this conversation. Cynthia Nunez states in her declaration that she did not want to invade Plaintiff's privacy by asking the reason for his hospitalization and merely asked when he could return to work. Nunez Decl. at 3, ¶ 8. She further states in her declaration that Plaintiff told her he did not know when he could return to work and that it might be "sometime in August" before he could return. *Id*. Plaintiff, on the other hand, testified in his deposition that he told Cynthia Nunez that he was enrolled in a two-week treatment program, but that there was a possibility that he would need to stay for a four-week program, and that he might not be able to return to work "till August." Stewart Deposition at 189-190 (Exh. A to Rubin Declaration).[5] Plaintiff further testified in his deposition that he offered to leave the hospital and return to work immediately if he was in any danger of losing his job. Stewart Deposition at 188 (Exh. X to Levin Decl.). According to Stewart, Ms. Nunez told him not to worry about it. Stewart Deposition at 190 (Exh. A to Levin Decl.).

Around the same time Cynthia Nunez spoke to Plaintiff in the hospital, she also had a conversation with Plaintiff's treating physician, Dr. Lewis. *See* Nunez Decl. at 3, ¶ 7. According to a memorandum

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[5] Defendants state in their motion that "Plaintiff explained his conversation with Ms. Nunez as follows:

> That would be impossible to give somebody an exact date when you are in a psychiatric in-patient unit, because you don't know which way the therapy is going to go, so it's impossible. And the doctors don't know. They know there's a two week or a four week program, and you can reach the end of the two-week program or four-week program and something could happen where you flip out and say, 'We can't leave this guy go yet' or 'We better keep him,' so that's all kind of vague.

Motion at 4 (citing to Stewart Deposition at 190-191 (Exh. A to Rubin Decl.)). Plaintiff made this statement during his deposition when asked why he had not provided Ms. Nunez with an exact return date. However, there is no evidence in the record suggesting that Plaintiff made such a statement to Ms. Nunez when he spoke to her on July 9 or that he ever told her that he did not expect to be able to return to work in August.

written by Cynthia Nunez on July 9, 1993, Dr. Lewis told her that Plaintiff would be confined for another two weeks. July 9, 1993 Memorandum from Cynthia Nunez to Chief of Human Resources Management (Exh. B to Nunez Decl.) In that memorandum, Cynthia Nunez requested that she be permitted to terminate Plaintiff's employment, effective July 24, 1993, on the basis that Plaintiff's doctor expected him to be hospitalized two more weeks and Plaintiff himself had said he might not be available "till August." *Id*. In requesting Plaintiff's termination, Ms. Nunez pointed to an "extreme need for workers who can do the job." *Id*. The Chief of Human Resources agreed to the request, and Plaintiff was terminated on July 13, 1993. Nunez Decl. at 4, ¶ 10. On July 14, 1993, Plaintiff's doctor, along with an attending nurse, informed Plaintiff (who was still hospitalized) that he had been terminated from his position at Golden Gate Cemetery. *See* Stewart Deposition at 192 (Exh. I to Levin Decl.); *see also* Livingston EEOC Statement (Exh. G to Levin Decl.) (stating that Livingston discussed Plaintiff's condition with Dr. Lewis and that Dr. Lewis told Livingston that he wanted to "break the news" to Plaintiff that he had been terminated).

On the same day that Cynthia Nunez requested Plaintiff's termination, she completed a Personnel Action Form, signed by both Nunez and William Livingston, in which she requested that a replacement for Mr. Stewart be hired. Nunez Decl. at 4, ¶ 11. The "proposed effective date" on the Request For Personnel Action was July 26, 1993. Request For Personnel Action (Exh. R to Levin Decl.). The new position was temporary and was set to expire on September 30, 1993, the same date on which Plaintiff's position had been set to expire. *Id*. On August 20, 1993, a replacement named Donald Armanasco was hired to fill the position. Livingston EEOC Statement (Exh. U to Levin Decl.). Armanasco is a white male veteran. Nunez Decl. at 4, ¶ 12. In the meantime, Plaintiff was released from the hospital on July 23, 1993. Doctor's Orders Discharging Stewart (Exh. S to Levin Decl.).

B. Claims

In his Second Amended Complaint, Plaintiff alleged seven claims. The last three of these were dismissed in this Court's order of May 8, 2000 for the reasons stated therein. Plaintiff's remaining claims are as follows:

Claim One: Intentional Infliction of Emotional Distress (Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1));

Claim Two: Negligent Infliction of Emotional Distress (Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1));

Claim Three: Racial Discrimination in Violation of Title VII (42 U.S.C. § 2000e-16);

Claim Four: Failure to Accommodate for Disability under the Rehabilitation Act (29 U.S.C. § 791).

Although Plaintiff named numerous defendants in his original complaint, the parties stipulated that in his Second Amended Complaint, Plaintiff would name the United States as a defendant and would dismiss all other defendants. *See* Stipulation To File Second Amended Complaint And Continue Case Management Conference, filed February 28, 2000. At the subsequent case management conference, on March 3, 2000, the parties stipulated that the Department of Veteran's Affairs would be added as a defendant as to all but the First and Second claims.[6] Finally, at oral argument on Defendants' Motion For Summary Judgment, the parties stipulated that the only defendant with respect to Claims Three and Four is Togo West, the head of the Department of Veteran's Affairs.

III. ANALYSIS

A. Rehabilitation Act Claim (Claim Four)

Plaintiff asserts that his employer discriminated against him on the basis of his disability and failed to provided reasonable accommodation of his disability, in violation of § 501 of the Rehabilitation Act, 29 U.S.C. § 791.[7] Second Amended Complaint at 2-3, ¶ 8. The Court notes that Defendants in their motion

[6] Under both Title VII and the Rehabilitation Act, the proper defendant is the head of the relevant agency. *See* 29 U.S.C. § 794a and 42 U.S.C. § 2000e-16.

[7] Section 501 provides, in relevant part, as follows:

(b) Federal agencies; affirmative action program plans

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch and the Smithsonian Institution shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

erroneously treat Plaintiff's Rehabilitation Act claim as a § 504 claim (29 U.S.C. § 794).[8] In fact, the Ninth Circuit has held that § 501 (29 U.S.C. § 791) is the exclusive remedy for federal employees bringing a claim of disability discrimination under the Rehabilitation Act. *Boyd v. United States Postal Service*, 752 F.2d 410, 413 (9th Cir. 1985). Because there are some significant differences between the requirements of §§ 501 and 504, the standards governing § 501 claims are discussed below.

1. Analytical Framework For § 501 Claims

Section 501 provides for two types of claims: 1) "non-affirmative action" employment discrimination claims based upon 29 U.S.C. § 791(g), *see, e.g., Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir. 1995), and 2) claims based upon a government employer's failure to reasonably accommodate an employee, as required under 29 U.S.C. § 791(b); *see, e.g., Buckingham v. United States*, 998 F.2d 735, 739 (9th Cir. 1993). The former category of claims are governed by the standards contained in the Americans With Disabilities Act ("ADA"), which are explicitly incorporated into 501(g).[9] Affirmative

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. . .

(g) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging non-affirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. § § 12201- 12204 and 12210), as such sections relate to employment.

29 U.S.C. § 791.

[8] Section 504 provides in relevant part as follows:

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. . . .

29 U.S.C. § 794(a).

[9] The key ADA provision that is incorporated into § 501 is 42 U.S.C. § 12112, which provides in relevant part as follows:

No covered entity shall discriminate against a qualified individual with a disability because of the

action claims for failure to reasonably accommodate, on the other hand, are governed by the explicit terms of § 501(b) and its enacting regulations, which set out in some detail the affirmative action requirements imposed upon federal agencies. 29 U.S.C. § 791(b); 29 C.F.R. § 1614.203(b); *see also Mantolete v. Bolger*, 767 F.2d 1416, 1422 (holding that regulations for § 501 "provide the guidelines for determining what constitutes 'reasonable accommodation'").

a. Non-Affirmative Action Claim

A plaintiff alleging a non-affirmative action claim under § 501 is required to make essentially the same prima facie case as is a plaintiff suing under § 504. Specifically, a plaintiff must show that: 1) he is disabled within the meaning of the statute; 2) he is "otherwise qualified" for the position; 3) he was adversely treated because of his disability; and 4) he worked for federal agency or entity. *Reynolds v. Brock*, 815 F.2d 571, 573-574 (9th Cir. 1987).[10] Once a prima facie case has been made, the burden

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> disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112. The term "qualified individual with a disability" is defined under the ADA as follows:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111 (incorporated into § 501 of Rehabilitation Act at 29 U.S.C. § 791(g)).

[10] The Court notes that the ADA standards incorporated into the Rehabilitation Act under § 501(g) do not require the adverse employment action to have been "solely by reason of" disability, in contrast to the explicit terms of § 504. *See* 42 U.S.C. § 12112(a). The omission of this language was not accidental. The House Committee Report explained the decision to remove the word "solely" as follows:

> The Committee recognizes that the phrasing of section 202 in this legislation differs from section 504 [of the Rehabilitation Act] by virtue of the fact that the phrase "solely by reason of his or her handicap" has been deleted. The deletion of this phrase is supported by the experience of the executive agencies charged with implementing section 504 [of the Rehabilitation Act]. The regulations issued by most executive agencies use the exact language set out in section 202 in lieu of the language included in the section 504 statute. A literal reliance on the phrase "solely by reason of his or her handicap" leads to absurd results. For example, assume that an employee is black and has a disability and that he needs a reasonable accommodation that, if provided, will enable him to perform the job for which he is

shifts to the defendant to demonstrate a legitimate, non-discriminatory reason for the action. *Id*. at 574. The burden then shifts back to the plaintiff to produce evidence showing that the reason offered by the defendant is pretextual. *See Smith v. Barton*, 914 F.2d 1330, 1339 (9th Cir. 1990) (applying *McDonnell Douglas* framework for Title VII discrimination claims to discrimination claim brought under ADA).

b. Affirmative Action Claim

In addition to the non-affirmative action claim described above (which is essentially the same as a claim of discrimination under § 504), § 501 allows a plaintiff to sue for failure to provide reasonable accommodation, as required under § 501(b). As the Ninth Circuit has explained, "[t]he duty on employers . . . goes beyond mere nondiscrimination; the regulations promulgated under section 501 emphasize the affirmative obligation to accommodate: An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program." *Buckingham v. United States*, 998 F.2d 735, 739 (quoting former 29 C.F.R. § 1613.704(a), now 29 C.F.R. § 1614.203(c)(1)).

In order to make a prima facie case based upon failure to reasonably accommodate, a plaintiff must show that: 1) he was an otherwise qualified handicapped individual; and 2) he received adverse treatment as a result of his handicap. *Id.* at 739-740. A "qualified handicapped individual" is one who "with or without accommodation can perform the essential functions of their job." *Id*. "If accommodation to their handicap is required to enable them to perform essential job functions, then plaintiffs must only provide evidence sufficient to make at least a facial showing that reasonable accommodation is possible." *Id. See*

> applying. He is a qualified applicant. Nevertheless, the employer rejects the applicant because he is black and because he has a disability. In this case, the employer did not refuse to hire the individual solely on the basis of his disability--the employer refused to hire him because of his disability and because he was black. Although the applicant might have a claim of race discrimination under title VII of the Civil Rights Act, it could be argued that he would not have a claim under section 504 [of the Rehabilitation Act] because the failure to hire was not based solely on his disability and as a result he would not be entitled to a reasonable accommodation. The Committee, by adopting the language used in regulations issued by the executive agencies, rejects the result described above.

McNely v. Ocala, 99 F.3d 1068, 1075 (11th Cir. 1996) (quoting H.R. Rep. No. 485(II), 2nd Sess., at 85 (1990)); *see also Severino v. North Fort Myers Fire Control District*, 935 F.2d 1179, 1183 (11th Cir. 1991) (holding that under § 504, the "solely by reason of" language does not preclude disability discrimination claims involving mixed motives and relying in part upon the regulations that implement § 504).

also Meisser v. Hove, 872 F. Supp. 507, 519 (N.D.Ill. 1994) (holding that a plaintiff may make a prima facie case based upon failure to accommodate by showing that: 1) he is handicapped and the employer was aware of the handicap; 2) he is otherwise qualified for the position; and 3) the employer failed reasonably to accommodate the handicap).

The burden then shifts to the employer to show that the proposed accommodation is not reasonable. *Buckingham*, 998 F.2d at 740. "An employer, to meet its burden under the Act, may not merely speculate that a suggested accommodation is not feasible. When accommodation is required to enable the employee to perform the essential functions of the job, the employer has a duty to gather sufficient information from the applicant and qualified experts as needed to determine what accommodation are necessary to enable the applicant to perform the job." *Id.* (citations omitted). However, an employer can show that a requested accommodation is unreasonable by demonstrating that it would result in undue hardship for the employer. *Id*.

In determining whether an accommodation would impose an undue hardship on an employer, courts look to the implementing regulations for § 501, which instruct that the following factors should be considered: 1) the overall size of the agency's program with respect to the number of employees, number and type of facilities and size of the budget; 2) the type of agency operation, including the composition and structure of the agency's work force; and 3) the nature and cost of the accommodation. *Id*.; *see also* 29 C.F.R. § 1614.203(c)(3). Included in the list of possible reasonable accommodations is "job restructuring" and "part-time or modified work schedules." 29 C.F.R. § 1614.203(c)(1).

2. Defendant's Arguments

Defendants assert that they are entitled to summary judgment on Plaintiff's Rehabilitation Act claim because: 1) Plaintiff has not shown that he was "otherwise qualified" for the position and 2) Plaintiff has not shown that he was terminated "solely because of" his disability. Motion at 6-8. Although Defendants raised these arguments in the context of a § 504 claim rather than a § 501 claim, the Court assumes without deciding that they are applicable to Plaintiff's § 501 claims. Because Plaintiff has presented evidence sufficient to raise issues of material fact on the questions of whether he was "otherwise qualified" and

whether he was terminated because of his disability, Defendants are not entitled to summary judgment on Plaintiff's claim under § 501 of the Rehabilitation Act.

a. Otherwise Qualified

Under § 501, a Plaintiff must show that he was "otherwise qualified" for the position, regardless of whether he is bringing a non-affirmative action claim or an affirmative action claim based upon failure to reasonably accommodate. Plaintiff in this action has alleged violations of § 501 under both theories and therefore must make a prima facie case that he was otherwise qualified in order to avoid summary judgment as to these two theories.

An "otherwise qualified person" is one who can perform the essential functions of the job in question. *School Board of Nassau County v. Arline* 480 U.S. 273, 287 n. 17 (1987). As the Supreme Court explained in *School Board of Nassau County v. Arline*:

> When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions. . . . Accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on a grantee, . . . or requires "a fundamental alteration in the nature of [the] program."

Id. Ordinarily, the question of whether a particular accommodation is reasonable is a question of fact. *Fuller v. Frank*, 916 F.2d 558, 562 n. 6 (9th Cir. 1990).

Here, Plaintiff asserts that he was "otherwise qualified" because, had he been permitted to take unpaid leave for the period during which he was hospitalized during the summer of 1993, he would have been able to return to work and perform the essential functions of his job. *See* Opposition at 6. An unpaid leave of absence may be a reasonable accommodation if it does not impose an undue hardship on the employer and it will permit the employee to eventually perform the essential functions of his job. *See Norris v. Allied-Sysco Food Service, Inc.*, 948 F. Supp. 1418, 1439 (N.D. Cal. 1996) (discussing the circumstances under which extended leave might constitute a reasonable accommodation under the ADA and noting that even unpaid leave of indefinite, or very length, duration, could under some circumstances be a reasonable accommodation).

Defendants, however, assert that this Court should find, as a matter of law, that such an accommodation would not have been reasonable. Motion at 6-8. In support of this contention,

Defendants cite to a number of cases, all of which are distinguishable from this case. *See Jackson v. Veteran's Administration*, 22 F.3d 277 (11th Cir. 1994) (affirming summary judgment in favor of defendant on Rehabilitation Act claim and holding that requiring employer to accommodate employee's repeated, sporadic and unscheduled absences caused by disability by "making last-minute provisions for [the employee's] work to be done by someone else" would place undue hardship on employer); *Walders v. Garrett*, 765 F. Supp. 303, 310, 313 (E.D. Va. 1991) (holding on the basis of evidence presented during bench trial that requiring employer to accommodate Plaintiff's absences due to her disability would place undue hardship on employer where Plaintiff missed between sixty and ninety work days each year, where these absences were unscheduled and "essentially random," and where plaintiff worked in a small division that faced time deadlines and budget restrictions); *Wimbley v. Bolger*, 642 F. Supp. 481, 485 (W.D. Tenn. 1986) (rejecting Motion For New Trial Or To Alter Or Amend Judgment where court had held, on the basis of evidence presented during bench trial, that requiring employer to accommodate Plaintiff's unscheduled absences would impose undue hardship, where Plaintiff insisted that it was impossible for him to comply with requirement that he provide documentation substantiating where he had been or to request appropriate leave); *Matzo v. Postmaster General*, 685 F. Supp. 260 (D.D.C. 1987) (finding that plaintiff was not "otherwise qualified" where plaintiff had been terminated several months after she "abruptly left the office without permission," had never returned to work and had failed to respond to repeated notices warning her that she would be terminated if she did not report for fitness-for-duty exam); *Law v. United States Postal Service*, 852 F.2d 1278, 1280 (Fed. Cir. 1988) (holding that Postal employee was not "otherwise qualified" where she had a history of unscheduled absences and tardiness, had been reprimanded on many occasions and where she had not sought prior approval for any of her unscheduled absences); *Amato v. St. Luke's Episcopal Hospital*, 987 F. Supp. 523 (S.D. Texas 1997) (granting defendants' motion for summary judgment on ADA claim on basis that plaintiff was not otherwise qualified because plaintiff had long history of unscheduled absences and had been repeatedly counseled and disciplined for his poor attendance).

In all of the cases cited by Defendants listed above, it was undisputed that the employees' absences were unscheduled and unpredictable. In finding that it would be unreasonable to require employers to accommodate such absences, the courts pointed not only to the frequency of these absences but also to the

burden on employers of making last-minute provisions to cover for these absent employees. *See, e.g.*, *Jackson*, 22 F.3d at 279 (rejecting proposed accommodation and stating that "[s]uch accommodations do not address the heart of the problem: the unpredictable nature of Jackson's absences. There is no way to accommodate this aspect of his absences"). In contrast, in this case it is undisputed that prior to his hospitalization, Plaintiff had always obtained advance approval from his supervisors for his absences due to medical appointments. Nunez Decl. at 2, ¶ 5. In addition, Plaintiff has presented evidence from which a reasonable jury could conclude that he also obtained prior approval from his supervisors to enter the hospital in June 1993. *See* DeLasorda EEOC Statement (Exh. M to Levin Decl.) (stating that he was sure that Plaintiff had requested leave before entering the hospital); Stewart Deposition at 170 (Exh. DD to Levin Decl.) (stating that Chris DeLasorda spoke to Dr. Lewis about Stewart approximately one week before Stewart entered the hospital); Deposition of Cynthia Nunez at 65 (Exh. Z to Levin Decl.) (conceding that Plaintiff was "hospitalized with appropriate leave"). In light of this distinction, the Court finds that the cases cited by Defendants do not support their assertion that Plaintiff, as a matter of law, is not "otherwise qualified."

Defendants further assert, however, that they could not have been expected to accommodate Plaintiff's absence because they did not know the exact date upon which Plaintiff would return to work. Motion at 7. In support of this contention, Defendants cite to another long list of cases, most of which address the question of whether an "indefinite, lengthy, unpaid leave of absence" is a reasonable accommodation. None of these cases support Defendants' position. *See Norris*, 948 F. Supp. at 1438-1439 (denying Defendants Motion For Judgment As A Matter Of Law on ADA claim after jury found in favor of Plaintiff and, in dicta, rejecting Defendants contention that requiring an employer to grant an employee unpaid leave of over one year is unreasonable as a matter of law); *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1093 (5th Cir. 1997) (affirming summary judgment in favor of employer on ADA claim where employee's diabetes prevented him from meeting the physical and mental demands of his job, rejecting the contention that he would have been able to meet these demands better if he had been switched to a day shift, and noting in addition that because the employer did not have a day shift, the proposed accommodation would have imposed an undue burden on the employer by requiring that other employees worked harder); *Hudson v. MCI Telecommunications*, 87 F.3d 1167, 1169 (10th Cir. 1996) (affirming

summary judgment for employer on ADA claim and rejecting Plaintiff's claim that her employer should have allowed her to take an indefinite leave of absence to recover from her condition where plaintiff "failed to present any evidence of the expected duration of her impairment as of the date of her termination" but noting that "a reasonable allowance of time for medical care and treatment may, in appropriate circumstances, constitute a reasonable accommodation"); *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995) (affirming summary judgment in favor of employer on ADA claim and rejecting Plaintiff's contention that employer should have allowed him to take an indefinite leave, at half-salary, to allow him to bring his severe heart condition, diabetes and hypertension under control where Plaintiff set "no temporal limit on the advocated grace period, urging only that he deserve[d] sufficient time to ameliorate his conditions"); *Morton v. GTE North, Inc.*, 922 F. Supp. 1169 (N.D. Texas 1996) (granting summary judgment in favor of employer on ADA claim where Plaintiff's depression had resulted in her inability to perform her job, where the employer had allowed her to take six month's leave, where the employer had attempted to find a less stressful position but could find no position that the employee agreed to and/or could perform, and where there was no indication that plaintiff would ever have been able to perform the essential functions of her job, even if she had been granted indefinite leave; also stating in dicta that "this court doubts that indefinite leave could ever be demanded as a reasonable accommodation"); *Guice-Mills v. Derwinski*, 772 F. Supp. 188 (S.D.N.Y. 1991) (holding after a bench trial on employee's Rehabilitation Act claim that employer was not required to accommodate employee who was suffering from depression by allowing her to begin her shift at 10:00 a.m. rather than between 7 and 8 a.m. where employee was head nurse and would have been unable to handle staffing problems that often arise in the morning, attend morning meetings or review patient care issues with the night supervisor at the end of her shift and where employer had already allowed employee to take a seven month leave to treat her depression).

In the cases cited by Defendants involving "indefinite leave," the plaintiffs requested extended leave as an accommodation but provided no evidence concerning how long that leave was likely to last. *See, e.g., Hudson v. MCI Telecommunications*, 87 F.3d 1167, 1169 (10th Cir. 1996). Indeed, many of the Plaintiffs had already been granted extended leave and showed no sign of improvement. *See, e.g., Morton v. GTE North, Inc.*, 922 F. Supp. 1169 (N.D. Texas 1996). Here, in contrast, there is evidence in the record from which a reasonable jury could conclude that although the exact date of Plaintiff's return was

uncertain, neither Plaintiff nor employer expected that Plaintiff's absence would extend beyond August, 1993. *See* July 9, 1993 Memorandum from Cynthia Nunez to Chief of Human Resources Management (Exh. B to Nunez Decl.) (requesting permission to terminate Plaintiff's employment, effective July 24, 1993, on the basis that Plaintiff's doctor expected him to be hospitalized two more weeks and Plaintiff himself had said he might not be available "till August"). Nor do Defendants assert or present any evidence that Plaintiff would not have been able to perform the essential functions of his job once he had been released from the hospital. As a result, there is a triable issue of fact on the question of whether or not an unpaid leave of definite duration would have been a reasonable accommodation that would have permitted Plaintiff to perform the essential functions of his job.

Finally, Defendants assert that permitting Plaintiff to take unpaid leave during the period of his hospitalization would have imposed an undue burden on Defendants because the cemetery requires the most maintenance in the summer months, when the grass grows faster, and therefore there was an urgent need to replace Plaintiff immediately. Motion at 8; Nunez Decl. at 2, ¶ 3. However, Plaintiff has presented evidence that the peak period for cemetery maintenance is the period leading up to Memorial Day rather than in the summer months. DeLasorda EEOC Statement (Exh. F to Levin Decl.). He has also presented evidence that his immediate supervisor did not feel that there was an urgent need to replace Plaintiff immediately. *Id*. Finally, Plaintiff has presented evidence that suggests that he had enough annual and sick leave to cover his hospitalization. *See* Nunez Deposition at 65 (Exh. Z to Levin Decl.) (conceding that Plaintiff was "authorized enough leave hours to be hospitalized").[11] Thus, there is a genuine factual dispute concerning a key issue of Plaintiff's case, namely, whether offering Plaintiff leave of definite duration would have imposed an undue burden on Defendants. This factual dispute may not be resolved by the Court on summary judgment. The court therefore rejects Defendants' contention that they are entitled to summary judgment because Plaintiff is not "otherwise qualified" for his position.

b. Termination "Solely Because of Disability"

[11] Plaintiff refers in his Opposition to documents produced by Defendants purporting to show that Plaintiff had used up his annual and sick leave by the time he was terminated. Opposition at 18. However, Defendants do not assert in their motion or reply brief that Plaintiff did not have enough annual and sick leave to cover his absence while he was hospitalized.

Defendants assert that Plaintiff cannot satisfy the requirement that his termination must have been solely because of his disability, arguing that Plaintiff was terminated only because he was unavailable for work and not because of his disability. Motion at 8. Defendants rely on a line of cases that hold that misconduct caused by a disability is not protected under the Rehabilitation Act. *See Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir. 1996) (holding that employee who was fired after being arrested for attempting to fire an assault weapon at a bar while on a "drunken rampage" had been fired because of misconduct and not because of his alcoholism); *Williams v. Widnall*, 79 F.3d 1003, 1007 (10th Cir. 1996) (holding that alcoholic employee who made threats to co-workers and supervisors while under the influence of alcohol was terminated because of "egregious, misconduct" and not because of alcoholism); *Brohm v. J.H. Properties, Inc.*, 947 F. Supp. 299, 300 (W.D. Ky. 1996) (holding that anaesthesiologist who repeatedly fell asleep during surgical procedures was fired for sleeping on the job in violation of hospital rules and good medical practice and not because he had sleep apnea); *Maddox v. University of Tennessee*, 62 F.3d 843, 847 (6th Cir. 1995) (holding that employee who was arrested for drunk driving and who had been hostile and combative towards officer when stopped had been terminated for egregious misconduct rather than because of his alcoholism). The rational underlying all of these cases is that "[e]mployers subject to the Rehabilitation Act and ADA must be permitted to take appropriate action with respect to an employee on account of egregious or criminal conduct, regardless of whether the employee is disabled." *Maddox*, 62 F.3d at 848.

These cases have no bearing on the issue of whether Plaintiff's termination was caused by his disability because Defendants have never asserted, much less provided any evidence, that Plaintiff's termination resulted from misconduct of any kind. To the contrary, Defendant's have repeatedly stated that their sole reason for terminating Plaintiff was that he was unable to work while he was hospitalized, in June and July of 1993. *See, e.g.*, Motion at 9; Nunez Decl. at 3, ¶ 9 (stating that Nunez recommended terminating Plaintiff when she learned that Plaintiff might not be able to return "sometime in August"); Nunez Deposition at 64 (Exh. F to Levin Decl.) (conceding that Plaintiff was not fired for being a bad worker or for having a bad attitude and that Plaintiff was a "good employee"). To extend the holdings of the cases above to situations in which no misconduct has been alleged would render meaningless the affirmative duty of federal employers to offer reasonable accommodation to employees with a disability,

allowing an employer to terminate any employee who required time off from work for treatment of a disability without reaching the issue of whether the employer could have reasonably accommodate the employee. The Court therefore rejects Defendant's assertion that Plaintiff's termination was not solely because of his disability.[12]

B. Title VII Claim (Claim Three)

Plaintiff asserts that Defendants discriminated against him on the basis of race, in violation of Title VII, by terminating him rather than allowing him to take extended leave for the period during which he was hospitalized. Second Amended Complaint at 6-7. Under Title VII, "[a]ll personnel actions affecting employees [of the federal government] . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). Claims of employment discrimination under Title VII are analyzed under framework articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In *McDonnell-Douglas*, the Supreme Court adopted a three-part analysis: "(1) [t]he complainant must establish a prima facie case of discrimination; (2) the employer must offer a legitimate reason for his actions; (3) the complainant must prove that this reason was a pretext to mask an illegal motive." 411 U.S. at 802.

On summary judgment, the requisite degree of proof to establish a prima facie case is minimal and does not even need to rise to the level of preponderance of the evidence. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987). A plaintiff need only offer evidence which "gives rise to an inference of unlawful discrimination." *Lowe v. City of Monrovia*, 775 F.2d 998, 1005 (9th Cir. 1983); *see also Sischo-Nownejad v. Merced Community College Dist.*, 934 F. 2d 1104, 1111 (9th Cir. 1991) (holding that "[t]he amount of evidence that must be produced in order to create a prima facie case is very little").

If the employee establishes a prima facie case, the burden shifts to the employer to "rebut the presumption of discrimination by producing evidence that [the plaintiff] was rejected, or someone else was

[12] The Court does not dispute Defendants' position that the Ninth Circuit has rejected the holding of *Teahan v. Metro-North Commuter R.R. Co.*, 951 F.2d 511 (2d Cir. 1991) to the extent that that case "suggest[s] that if the misconduct is causally related to the disability it cannot be grounds for termination." *Newland*, 81 F.3d at 906. As noted above, however, this case does not involve termination for alleged misconduct.

preferred, for a legitimate, non-discriminatory reason." *Burdine*, 450 U.S. at 254. However, it is only the burden of production that shifts. *Id*. The burden of persuasion never shifts from the plaintiff. *Id*. Therefore, the employer need not persuade the court that it was actually motivated by the proffered reason. *Id*. Rather, "it is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against plaintiff." *Id*. at 254-255.

Once the employer has articulated a legitimate, non-discriminatory reason for its actions, and presented sufficient evidence to create a genuine issue of fact, an employee can survive summary judgment only if she offers "specific and significantly probative evidence that the employer's alleged purpose is a pretext for discrimination." *Schuler v. Chronicle Broadcasting Company*, 793 F.2d 1010, 1011 (9th Cir. 1986). "A plaintiff 'may succeed in persuading the court that she has been the victim of intentional discrimination . . . either by directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered reason is unworthy of credence.'" *Lowe*, 775 F.2d at 1008 (quoting *Burdine*, 450 U.S. at 256). However, "'the decision as to an employer's true motivation plainly is one reserved to the trier of fact.'" *Id*. (quoting *Peacock v. DuVal*, 694 F.2d 644, 646 (9th Cir. 1982)). Thus, where an employee has established a prima facie case of discrimination, "summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of [the dispute] is the 'elusive factual question of intentional discrimination.'" *Id*. (quoting *Burdine*, 450 U.S. at 255 n. 8.

1. Prima Facie Case

In order to establish a prima facie case of race discrimination on the basis of termination, a plaintiff must show that: 1) he was within the protected class; 2) he was performing his job well enough to rule out the possibility that he was fired for inadequate job performance; and 3) his employer sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the same services and skills. *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 672 (9th Cir.1988). Plaintiff has presented sufficient evidence to defeat Defendant's motion for summary judgment as to his prima facie case of discrimination.

First, Plaintiff is a white male who alleges that he was treated less favorably than Filipino workers. It is well-established that Title VII protects white and non-white employees alike from racial discrimination.

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 280 (1975). Second, Plaintiff has presented evidence that his employer considered him a "good worker." *See* Nunez Deposition at 64 (Exh. FF to Levin Decl.) (conceding that Plaintiff was not fired because he was a bad worker or had a bad attitude and that Plaintiff was a good worker). Moreover, to the extent that Plaintiff's unavailability for work may have made him unqualified for the job, there is a factual dispute (discussed above) as to whether Plaintiff's employer could have reasonably accommodated Plaintiff by offering him leave of definite duration. Because this factual dispute goes directly to the question of whether Defendants' articulated reason for terminating Plaintiff was pretextual, the Court may not grant summary judgment on the basis that Plaintiff was not qualified where Plaintiff has offered evidence to the contrary. *See Sischo-Nownejad v. Merced Community College District*, 934 F.2d 1104, 1110 (9th Cir. 1991) (holding that amount of evidence to create prima facie case of discrimination on summary judgment is "very little"). Finally, his employer later filled the position, demonstrating that the cemetery had a continuing need for an employee with skills similar to his own. *See* Livingston EEOC Statement (Exh. U to Levin Decl.) (stating that Plaintiff was replaced by Donald Armanasco).

2. Non-Discriminatory Reason

Defendants assert that they did not terminate Plaintiff due to race but merely because he was unavailable during the summer months, when they had an urgent need for someone to perform his duties. Motion at 11. As Defendants have articulated a non-discriminatory reason for their actions, the burden shifts to Plaintiff to offer evidence that the reason offered by Defendants is pretext.

3. Evidence of Pretext

Plaintiff asserts that the reason he was terminated was not his unavailability but his race. In particular, he points to evidence that non-white employees were permitted to take extended leave whereas when Plaintiff sought to take a comparable period of leave to obtain treatment of his PTSD, his employer terminated him. Opposition at 15-16; Dorothy Wells Sworn EEOC Statement (Exh. KK to Levin Decl.) (stating that "when I'd look through records of leave and stuff at the cemetery, I found that some of the

Filipinos were granted months of leave to go to the Philippines")[13]; *see also* Nunez Decl. at 4, ¶ 13 (stating that Nunez had permitted a Filipino employee to take a one-month leave to visit the Philippines). The Court finds this evidence sufficient raise a triable issue of fact as to Plaintiff's employer's motive in terminating Plaintiff.

Defendants assert, however, that there was only a single employee who was allowed to take a one-month leave and that he was not similarly situated in comparison to Plaintiff because: 1) he took the leave in January, which is a slower period for the cemetery than the summer months; 2) he gave over one month advance notice of his intent to take the trip to the Philippines; and 3) he was a permanent rather than a temporary employee. Motion at 10. The Court does not dispute that an employee who is alleged to have been treated more favorably than a plaintiff alleging discrimination must be similarly situated in order to give rise to an inference of discrimination. *See Box v. A & P. Tea Co.*, 772 F.2d 1372, 1379 (7th Cir. 1985). Here, however, the question of whether the Filipino employee in question was similarly situated turns on disputed facts. In particular, while Defendants have provided an affidavit by Cynthia Nunez stating that the need for workers is greater in the summertime than it is in January, *see* Nunez Decl. at 4, ¶ 13, Plaintiff has presented conflicting evidence suggesting that the summer months are not the peak period for the cemetery and that his immediate supervisor did not feel a pressing need to replace him right away. *See* DeLasorda EEOC Statement (Exh. F to Levin Decl.) (stating that "big push" is April and May, leading up to Memorial Day and that he did not feel that Plaintiff needed to be replaced immediately). In addition, Plaintiff has presented evidence suggesting that he had obtained advanced authorization of his hospitalization, just as the other employee had. *See* DeLasorda EEOC Statement. Moreover, to the extent that Plaintiff's unavailability for work may have made him unqualified for the job, there is a factual dispute (discussed above) as to whether Plaintiff's employer could have reasonably accommodated Plaintiff by offering him leave of definite duration. (Exh. M to Levin Decl.) (stating that he was sure that Plaintiff had requested leave before entering the hospital); Stewart Deposition at 170 (Exh. DD to Levin Decl.) (stating that Chris DeLasorda spoke to Dr. Lewis about Stewart approximately one week before Stewart entered the hospital); Deposition of Cynthia Nunez at 65 (Exh. Z to Levin Decl.) (conceding that Plaintiff was

[13] It appears from Ms. Wells' statement that she was a supervisor at the cemetery and was also an EEO counselor who was involved in an EEO investigation of Plaintiff's claims.

"hospitalized with appropriate leave"). Finally, Defendants fail to explain why an employee's temporary or permanent status would affect an employees entitlement to take extended leave. In the face of these factual disputes, the Court declines to hold as a matter of law that Defendants were not motivated by race when they terminated Plaintiff.

Nor does the fact that the cemetery hired a white male to replace Plaintiff entitle Defendants to summary judgment. As the Court stated in *Hannon v. Chater*, although evidence that the person hired to replace a plaintiff in a discrimination action is of the same race is "extremely helpful to the defendant's rebuttal in supporting [a] nondiscriminatory justification for its employment action . . . it would be a mistake to assume that such evidence amounts to an ironclad defense." 887 F. Supp. 1303, 1313 (N.D.Cal. 1995) (citation omitted). Here, Plaintiff has presented sufficient evidence to create a factual question concerning his employer's motivations. Therefore, summary judgment on his race discrimination claim is inappropriate. [14]

C. Intentional and Negligent Infliction of Emotional Distress Claims (Claims One and Two)

Plaintiff asserts claims of intentional and negligent infliction of emotional distress against Defendants under the Federal Tort Claims Act. Second Amended Complaint at 4-5; 28 U.S.C. § 1346(b)(1).[15] In

[14] With respect to Defendants' assertion that the promotion of various Filipino employees to permanent positions is not relevant to Plaintiff's race discrimination claim, the Court agrees. Motion at 10. Plaintiff does not allege in his complaint or anywhere else in the record that his Title VII claim is based upon discriminatory failure to promote. Nor has he presented any evidence that he would have been treated differently if he had been a permanent employee rather than a temporary employee. Finally, Plaintiff fails to provide any evidence in response to the assertions in Defendants' motion that the employees who were promoted were not similarly situated to Plaintiff. By the same token, the Court finds that Defendants' evidence concerning the racial breakdown of the employees at the cemetery is not relevant to the question of whether Defendants discriminated against Plaintiff on the basis of race. *See* Motion at 9-10; Nunez Decl. at 5, ¶ 14. Nor does the fact that Plaintiff admitted he was unaware of the number of permanent employees in 1991 or of the racial breakdown of the work force there have any bearing on the question of whether Defendants discriminated against Plaintiff on the basis of race

[15] This section provides as follows:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance

the section of the complaint listing the specific claims, Plaintiff does not identify the factual basis for each claim. However, in his statement of facts, Plaintiff makes the following allegations:

> On or about July 13, 1993 defendants and their agents acted together to wrongfully discharge plaintiff from his employment as Cemetery Caretaker, WG-02. Defendants and their agents deliberately took unfair advantage of plaintiff's mental disorder to induce him to be temporarily hospitalized for treatment and stabilization of medications. While hospitalized, defendants increased plaintiff's dose of psychoactive drugs for the specific purpose of reducing his anxiety when he was presented with his job termination. This conduct caused severe and permanent physical, mental and emotional impairment.

Second Amended Complaint at 3-4, ¶ 13. These allegations are incorporated into both of Plaintiff's emotional distress claims. Second Amended Complaint at ¶¶ 14 and 20. Therefore, the Court construes each of Plaintiff's emotional distress claims as encompassing three theories: 1) Defendants wrongfully discharged Plaintiff; 2) Defendants wrongfully induced Plaintiff to be hospitalized; and 3) Defendants increased Plaintiff's medications while he was hospitalized in order to reduce his anxiety when presented with his termination. The Court finds that with respect to the first theory, Plaintiff's emotional distress claims are preempted by Title VII and the Rehabilitation Act. With respect to the remaining theories, Plaintiff has presented no evidence to support either theory. Therefore, the Court finds that there is no triable issue of fact on these claims.

1. Preemption

Title VII is the exclusive remedy for employment discrimination claims by federal employees. *Brown v. General Services Administration*, 425 U.S. 820, 835 (1976). Further, the holding of *Brown* also applies to employment discrimination claims based upon disability under the Rehabilitation Act. *Boyd v. United States Postal Service*, 752 F.2d 410, 413 (9th Cir. 1985) (holding that § 501 of the Rehabilitation Act is "the exclusive remedy for discrimination in employment by the Postal Service on the basis of handicap"); *Vinieratos v. United States*, 939 F.2d 762, 773 (9th Cir. 1991) (same holding as to employee of the Air Force). Therefore, to the extent that Plaintiff's emotional distress claims are based upon a theory of wrongful termination, they are preempted by Title VII and the Rehabilitation. Act. *See*,

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with the law of the place
where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

e.g., Brock v. United States, 64 F.3d 1421, 1424 (9th Cir. 1995)(affirming dismissal of plaintiff's claim of negligent supervision under FTCA on basis that it was preempted by Title VII where claim was based upon allegation that coworkers retaliated against plaintiff after she filed EEO complaint against supervisor for sexual harassment and court concluded that this stated "no more than an employment discrimination claim").

On the other hand, to the extent that Plaintiff's emotional distress claims are based upon his allegations that he was wrongfully induced to enter the hospital and wrongfully administered drugs, these claims are based upon different facts than Plaintiff's wrongful discharge claims under Title VII and the Rehabilitation Act, and therefore are not preempted by those statutes. *See Pfau v. Reed*, 125 F.3d 927, 932 (5th Cir. 1997) (holding that "when a complainant against a federal employer relies on the same facts to establish a Title VII claim and a non-Title VII claim, the non-Title VII claim is not sufficiently distinct to avoid preemption").[16]

2. Claims That Are Not Preempted By Title VII And Rehabilitation Act

Defendants assert that Plaintiff's emotional distress claims should be dismissed because the facts alleged do not, as a matter of law, rise to the level of outrageousness required under state law for emotional distress claims. Motion at 11-12. The Court notes that under California law the outrageous conduct standard applies only to claims of intentional infliction of emotional distress and not to claims for negligent infliction of emotional distress. *See Carney v. Rotkin Schmerin & McIntyre*, 206 Cal. App. 3d 1513, (1988) (explaining that negligent infliction of emotional distress is not an independent tort but rather a type of negligence claim involving the usual elements of duty, breach causation and harm). However, the

[16] Even if Plaintiff's emotional distress claims based upon his allegations that he was wrongfully induced to enter the hospital and administered drugs relied upon the same underlying facts as his Title VII and Rehabilitation Act claims, it is possible they would not be preempted. The Ninth Circuit recognizes an exception to the broad rule articulated in *Pfau v. Reed*. It has held that Title VII and the Rehabilitation Act do not preempt claims based upon "highly personal harm beyond discrimination," even if the claims arise from the same core of facts. *Brock*, 64 F.3d at 1423 (holding that Title VII did not bar plaintiff's claim of negligent supervision of supervisor under FTCA where supervisor had allegedly raped plaintiff, even though such behavior would constitute sexual harassment under Title VII). Thus, when the "harms suffered involve something more than discrimination, the victim can bring a separate claim." *Id*. Because Plaintiff's emotional distress claims based upon his allegations that he was wrongfully induced to enter the hospital and administered drugs are based upon different facts, however, the Court does not reach the issue of whether this exception to Title VII and Rehabilitation Act preemption applies here.

Court need not reach the question of whether the conduct alleged by Plaintiff as to Defendants' inducing him to enter the hospital and wrongfully administering drugs satisfy either standard because Plaintiff has presented no evidence to support his claims under either theory. Specifically, aside from the allegations in the complaint quoted above, Plaintiff presents no evidence that he was pressured by anyone to enter the hospital. On the contrary, he has characterized his admission to the hospital as "voluntary." Opposition at 20. Further, although Plaintiff has presented evidence that drugs were administered to him while in the hospital, *see* Stewart Deposition at 187 (Exh. X to Levin Decl.) (listing drugs that Plaintiff was taking at the time that he called Cynthia Nunez from the hospital, on July 9), and that his doctor broke the news to him that he had been terminated, *see* Stewart Deposition at 191-192 (Exh. I to Levin Decl.) (stating that Plaintiff's doctor gave him a letter on July 14 informing him that he had been terminated), he has presented no evidence suggesting that drugs were administered prior to telling him of his termination or that any such drugs were administered with the specific intent of reducing his stress when he was told of his termination. As a result, he has failed to create a triable issue of fact on either claim.

IV. CONCLUSION

For the reasons stated above, the Court holds as follows:

1) Defendants' Motion For Summary Judgment is DENIED as to Plaintiff's claim under § 501 of the Rehabilitation Act, 29 U.S.C. § 791 (Claim Four);

2) Defendants' Motion For Summary Judgment is DENIED as to Plaintiff's claim under Title VII, 42 U.S.C. § 2000e-16 (Claim Three);

3) Defendants' Motion For Summary Judgment is GRANTED as to Plaintiff's claim for intentional infliction of emotional distress (Claim One) and for negligent infliction of emotional distress (Claim Two) and those claims are DISMISSED.

IT IS SO ORDERED.

DATED: October 10, 2000

JOSEPH C. SPERO
United States Magistrate Judge